

you know, Congress has already done that under Section 504 of the Rehabilitation Act. In the *Garrett* case, Ms. *Garrett* has a claim which is still pending under that very law. So it was just about Section 5, and, of course, it had nothing to do with the spending clause where Congress has conspicuously broad powers.

Senator SESSIONS. Well, I just would say in conclusion how much I appreciate the three of you. You are outstanding nominees with terrific records, unsurpassed experience handling some of our country's most difficult cases in ways that I think have shown your mettle and your ability. I congratulate you on the nominations to these important offices. I feel like that it is good for us to go through this process so that we confront the issue that just because a lawyer takes a position in a case does not mean that they are against the policy involved in the case. It does not mean if you defend a criminal that you are for criminals or you are for law-breakers. It means that criminals have certain rights, and the law has to be carried out in certain proper ways. And I believe that is your record in all of these cases, and I thank you for that, and I believe the President has done an outstanding job in these nominations.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator Sessions.

We will turn to Senator Durbin now.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you, Mr. Chairman. I want to thank the nominees who are before us today for your patience, and I hope that you understand that it is an unusual circumstance when we have three judges at this level being considered at the same time this early in the session, particularly when there are many questions to be asked of each of them. That has meant that this hearing has gone on much longer than usual and is likely to continue for some period of time.

I know the Chairman of the Committee and we have worked together in past years, and I am sure we will in the future. I just hope that the pace of the hearings is not such that this will appear to be a receiving line at an Irish wedding in terms of the nominees. I think we need to take time and deliberate, to ask important questions so that the people of this country know a little bit more about those who seek lifetime appointments to the second highest court of the land.

I would like to ask my questions of Professor Sutton because I have in this first round tried to focus on his activity and his career, and I will return to the other nominees in another round.

Professor Sutton, I have listened to some of your earlier testimony before this committee. It is interesting as I reflect on it. If you accept the premise that was recently stated by my colleague from Alabama that this is a somewhat mechanical and automatic process, that a judge who seeks the circuit court, for example, simply to read past cases, apply them to current cases, and move on, then it would strike me as odd that we don't have more nominees who are Democrats before us from the Bush White House.

Apparently there is a belief in the White House that even though it is a fairly automatic and mechanical process, they want to make

sure that if they are going to err, they are going to err on the side of people who have similar political views to the President. That suggests to me that this is not an automatic process. And I think—I hope—that you would concede that many close cases give judges at every level a chance to see a new facet of the law that hasn't been seen before, and perhaps in seeing it and ruling on it, to change the course of that law and its future.

Would you concede that point?

Mr. SUTTON. There is no doubt even Court of Appeals judges deal with difficult issues, but I do think a point that was raised earlier is a good one, whether it's the Sixth Circuit, other Courts of Appeals, or even the U.S. Supreme Court, a high percentage of cases are either unanimous or fairly unanimous, if it is at the U.S. Supreme Court, precisely because there usually are right answers. But I couldn't agree with you more that every now and then you do get very difficult cases. Of course, the more difficult the case, and particularly that have involved the constitutionality of a Federal law, the more likely the U.S. Supreme Court would review it. But I think your point is a very good and a fair one.

Senator DURBIN. I think it is important when a vast majority of bills and resolutions in the House and Senate never get any attention, nor should they. But a handful of important bills come before us, and we have to make a decision as to whether they should be the law of the land. And that really goes to the point that has been made over and over as to your values, who you are, what you are going to do on those close calls, when you have a case that truly is going to set a new precedent, that is really going to open up the new line of thinking.

And I think the fact that the reaction to your nomination has been so heated is an indication that many people are concerned, that when it comes down to those close cases, when the issue before the court is an issue of civil rights or human rights, the rights of minorities or women or the disabled in America, that you have shown a pattern of conduct of insensitivity by virtue of your advocacy in the past. I have never seen a hearing where we have had so many disabled Americans come forward, frankly, to protest your nomination. It tells me that they are concerned about you and what really is in your heart.

Now, in the past, in our history, seldom do people announce publicly that they are prejudiced. They don't say that. It is rare. The primacy of States' rights has historically been the beard for discrimination in America. Only a few people are bold enough to just state forthright that they oppose civil rights, the rights of women, minorities, and the disabled.

Instead, most have argued that they were not opposed to civil rights but only the power of the Federal Government to protect them. History has not been kind to those who concealed their sentiments in this legal distinction.

Mr. Sutton, Professor Sutton, your legal career has been spent practicing time and again in the shadows of States' rights. You have said in publications that have been quoted over and over again how much you value federalism and this whole issue where time and again you found yourself in key cases, like *Garrett*, on the side of States' rights as opposed to individual rights. You have be-

come a predictable, reliable, legal voice for entities seeking to limit the rights of Americans in the name of States' rights.

Do you believe that the *Garrett* case, despite what Senator Sessions has said, and its conclusion expanded or restricted the rights of disabled Americans?

Mr. SUTTON. Well, there's no doubt that it restricted in the sense that in that particular case someone was seeking relief and they didn't get it. But in that particular case, as I think I pointed out earlier, Ms. *Garrett's* Section 504 Rehabilitation Act claim is still pending, so she still may get relief. That would be the first point.

The second point is what the Court did—and I would point out that is not a case I've spoken publicly about. That's not a case I've written about. It was a case I was arguing on behalf of a client. I think the State did deserve representation at the U.S. Supreme Court. I think it would have been quite unusual had they not had it. But even in that case, with all of that, all it said was that the State at the end of the day was in charge of deciding when they could waive their sovereign immunity in the same way the U.S. Supreme Court has said the same thing about the U.S. Government. It doesn't mean in future cases claims can't be brought in Federal court if States waive them, and many States have waived them.

If there's one point, though, that I—some of the charges are—they're hurtful charges, and, you know, you asked about my values, and I think that is a fair question. It's an important question, and I do want to respond to that. There is no doubt this country's history when it comes to States' rights is despicable. There's no room for argument about that, and I think you know that's exactly how I feel. The worst violations, the most egregious violations when it comes to States' rights, of course, came in the area of race discrimination. And there, you know, if people are going to look at my advocacy, I hope they would appreciate that on a pro bono basis before I was State Solicitor, I defended Ohio's hate crime statute on behalf of every civil rights group with an interest in that type of legislation. I know the Federal Government is thinking of doing the same thing, on behalf of local chapters of the NAACP, the Columbus Urban League, several others. And while State Solicitor, I helped defend Ohio's set-aside statute.

So I do—I know it's very important, this process, for you to raise those questions, and I assume you want me to answer them, and that's how I'm responding—

Senator DURBIN. But there had to be this moment of truth for you as an attorney when you were asked to represent the Board of Trustees of the University of Alabama, when you knew that your success in that case would restrict the rights of disabled Americans, which you have conceded here, and you decided, not because you were assigned or required to, that you were going to forward in that role of advocate.

Now, there are many other examples that are exceptions to this rule, but the one that troubles the people who have gathered here in the disability community is that, conscious of what you were seeking you went forward and said, "I will be the advocate of the cause that will restrict the rights of disabled Americans."

Did that ever give you pause as to whether or not that was the just thing to do?

Mr. SUTTON. Sure, the case is an excruciatingly difficult case, and it did give me pause. But, first of all, I did not pursue the case. I was approached by the State and was hired by the State, and I did have the option, you're right, I have the option of saying no. But, remember, that's the exact same choice that the U.S. Solicitor General's office has been faced in 88 cases where they have said there's not—a claim cannot be brought by a Federal employee—

Senator DURBIN. The Solicitor General is not seeking appointment here today, our approval. It is you.

Mr. SUTTON. No, I'm not saying—I'm not making that point. I'm making the point that this is the job of an advocate, and the job of an advocate is not to decide in an exercise of vanity what is—what would I do, what could I do? It was long too late for that. I was not involved in the underlying decisions of the University of Alabama in terms of what to do with Ms. *Garrett*. I wasn't involved in the development of their constitutional arguments in the District Court and in the Court of Appeals. I became involved when they asked me to represent them in the U.S. Supreme Court, and I think if I have a sin here, the sin was that I did want to develop a U.S. Supreme Court practice. There's no doubt about that, and maybe that's what led me to take the case. But, Senator, I've done several cases, in fact, more cases on the disability rights side of the equation.

Senator DURBIN. Do you think there would have been a time when you would have had that chance to argue before the Supreme Court and would have said to yourself, rather than get another notch in my gun to go up to the Supreme Court, I just don't want to be identified with a case that restricts human rights, civil rights, the rights of the disabled?

[Applause.]

Chairman HATCH. Let's have order.

Mr. SUTTON. Senator, I respectfully—and, you know, this is a difficult place to make this point in this forum, but I couldn't disagree with you more. I think it is exceedingly wrong to ascribe the views of a lawyer—the client to the lawyer. That's exactly what the ABA code says. It's exactly what would prevent any criminal defense lawyer—I mean, I've represented two capital inmates. It doesn't mean I agree with their underlying acts or what happened. They deserved a representation. I provided that representation.

The one case—and this is, I think, the fair response to your question and your concern. I've only had one case that I can think of where I was given an opportunity to represent either side of a civil rights case. That's the Cheryl Fisher case. When that came up to the Ohio Supreme Court, I was given the opportunity to represent Cheryl Fisher, help her get into Case Western University as a blind medical student, or represent the side of the State universities who wanted to deny her that right. I recommended to the Attorney General—it was her choice, of course—that the State Solicitor ought to argue that case, and I thought she had the better side of the argument, and I did everything I could—or could to make that argument.

I've represented the National Coalition for Students with Disability in applying Federal law, the motor-voter law so that students with disabilities have access to the right to the vote.

In a case pending in the Ohio Supreme Court, the Gobo case, I inserted an argument not made below that an application of Ohio insurance law would violate the ADA.

My father, you know, ran a school for cerebral palsy children. I mean, I wouldn't say this is a perspective that is lost on me. But I did feel at that time my higher obligation was to the client and that they did deserve a right to representation before the court.

Senator DURBIN. Well, I will concede that you have represented many different clients, but when it comes to the cases that you have been involved in that have had the broadest impact on the greatest number of Americans and their rights, it is hard to find a case really in your career that matches the *Garrett* case. What was decided by the Court by virtue of your argument has denied rights to disabled people across America. It has restricted their rights to recover under the law. And as Senator Schumer said earlier, you can represent a lot of individual defendants before you make up for the loss of rights to a class of individuals, disabled individuals, because of that decision.

May I ask another question? As we try to monitor the legal DNA of President Bush's nominees, we find repeatedly the Federalist Society chromosome. And I would like to ask you as an officer of the Federalist Society—and I know every time I raise this at a hearing, the right-wing press screams bloody murder that this is dirty politics. But you have represented that you are an officer of the Federalist Society. Why is it that membership in the Federalist Society has become the secret handshake of the Bush nominees for the Federal court?

Mr. SUTTON. Well, I don't know that that's true. I don't have any idea whether it is true. The one point I would make is while I am a member of the Federalist Society, I'm also a member of the Equal Justice Foundation. And I hope—in thinking about my nomination, I know how important it is to realize who this person is and what kind of judge they would be.

You will keep in mind that while I have been a member of the Federalist Society, I was asked separately to join the Equal Justice Foundation, which—whose whole purpose is to provide legal service to the indigent. That, of course, is a pro bono effort, takes more time than anything I do for the Federalist Society, and as to the rest of your question, I don't know the answer.

Senator DURBIN. Let me just ask you your impression. What in your mind is the Federalist Society philosophy that draws so many Bush nominees to the Federal bench to its membership?

Mr. SUTTON. Well, I have no idea of what their philosophy is. In fact, my understanding is they don't take—

Senator DURBIN. Are you an officer? Are you not an officer?

Mr. SUTTON. I'm an officer of the Separation of Powers Working Group. That's true. But that doesn't mean there's a philosophy. In fact, my understanding of the Society is they don't take positions on cases.

The one point I would make is my understanding of the purpose of the Federalist Society and the reason I was attracted to joining it was that they've tried to sponsor forums to discuss important legal issues. And most of my involvement has been in the Columbus chapter to that end. And I think the Federalist Society has

done a very good job having presentations that involve speakers on both sides of the issue. In fact, most of the criticism I have heard of the federalism decisions all came from Federalist Society publications. First time I saw anyone criticize *Seminole Tribe* was in a Federalist Society publication. My article about the *City of Berne* decision was a point-counterpoint piece next to Judge McConnell's, Judge McConnell saying it was wrongly decided, my saying it was rightly decided.

So I do think they've tried hard to do that. I can understand someone having a different perspective on that.

Senator DURBIN. Let me ask you about your representation of tobacco companies in your private practice. You represented Lorillard Tobacco in challenging a Massachusetts regulation regarding the sale and promotion of tobacco products. In that case, you argued these regulations violated the Free Speech Clause of the First Amendment. In addition, you have been critical of the \$145 billion tobacco judgment in Florida. Although you are an advocate of States' rights in some contexts, you don't seem to like what they have done to tobacco companies.

What is your view generally about the efficacy of tobacco litigation, and do you feel that is ever justifiable?

Mr. SUTTON. Well, RJR is a Jones Day client, and that's how I became involved in that case. I was not involved in that case in the lower courts. I became involved in it when they tried to seek certiorari before the U.S. Supreme Court, and at the time I had a U.S. Supreme Court practice and I was asked by the firm to become involved in the case. And I did. I mean, it was a firm client, and I think it would have been a rather unusual decision on my part to not represent them, be unwilling to represent a client of the firm.

Senator DURBIN. Did you say RJR and Lorillard are clients of the firm?

Mr. SUTTON. No. RJR—all of the—the name of the case goes by Lorillard, but it had several tobacco companies in it.

Senator DURBIN. And RJR was your client.

Mr. SUTTON. Exactly. Exactly. And in terms of the case itself, you know, under the Free Speech Clause, that was the main issue in the case. It's no surprise in most of the biggest U.S. Supreme Court cases, the free speech argument is not on behalf of a popular client. I mean, that's often—or, for that matter, popular speech. That's exactly the way it traditionally goes, and I think if you looked at the 20 biggest free speech cases in the country, I suspect you'd disagree with the underlying speech in every single one of them, and I—

Senator DURBIN. I understand that, and historically—

Mr. SUTTON. But it's a constitutional right, and even though they may be—you know, it's a company with which people can disagree with the work they're doing, their products are legal. They've not been outlawed. And I think they do have a right to raise a constitutional offense.

Senator DURBIN. I don't argue with that premise at all. Again, it is a question about that moment in time when the senior partner came in and said, "Jeff, I want you to take up the cause of RJR, somebody's trying to restrict their advertising that's appealing to children," and you said, "I'll take it." That is a tough call, and law-

yers in their profession make those difficult calls. But I am, again, trying to find out what is driving you and motivating you in terms of your legal values, and as you said, it was one of the clients of the firm.

I don't know how much time I have left here.

Chairman HATCH. Your time has been up.

Senator DURBIN. All right. Thank you very much, Mr. Chairman. Thank you, Professor Sutton.

Chairman HATCH. Well, we will begin our second round then.

Senator DEWINE. I haven't gone.

Chairman HATCH. Well, could I ask one question before you do? Then I will turn to you.

Senator DEWINE. But I haven't done anything on the first round.

Chairman HATCH. Okay. I didn't know whether you—

Senator DEWINE. No, we haven't completed the first round.

Senator LEAHY. I thought you did a second round.

Senator DEWINE. No, I haven't done a second—I haven't done a first round.

Chairman HATCH. Well, let's turn to Senator DeWine.

Senator DEWINE. You can go ahead, Mr. Chairman.

Chairman HATCH. No, no. You go ahead. That is okay.

Senator DEWINE. Mr. Sutton, good afternoon. I know it has been a long day already for all of you, and we appreciate you all hanging with us.

Chairman HATCH. Excuse me just one second. If you need a break, just raise your hand and I will be glad to—

Mr. SUTTON. I am proving I am older than I look. I am getting there. But I will go another half-hour.

Chairman HATCH. Why don't we go another half-hour and then we will—let's go another 15 minutes with Senator DeWine, and then we will—

Senator DEWINE. We will see who has the guts to raise their hand, right?

Chairman HATCH. We will break for 5 minutes and then come back.

Senator DEWINE. The good news for all of you, it is a lifetime appointment.

Senator LEAHY. They probably feel like today has been a lifetime.

Senator DEWINE. Probably. That is right.

[Laughter.]

Senator DEWINE. Absolutely.

Mr. Sutton, I don't pretend to be a legal scholar, but I did have the opportunity to look at a lot of the cases that have gotten the bulk of the publicity in regard to the cases that you have argued before the Supreme Court. And I was here in the Congress when we passed the ADA, and I must be candid and tell you that I think if I was on the Supreme Court, I would have decided these cases differently. I don't agree with the decisions. I don't agree with the bulk of the decisions that you argued in front of the Supreme Court, at least on the controversial ones. But I am not sure how relevant that is. In fact, I don't think it is relevant at all.

I want to follow up with a line of questioning from my good friend Senator Durbin, and I wish he was here. I know he had to go to another meeting. But I think we go down and start down a